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No. 83-1013

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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REPLY BRIEF FOR PETITIONERS

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8 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The Decision Below Creates A Conflict In The Circuits And Is Contrary To Decisions Of This Court 1

II. The Decision Below Involves Important And Recurring Questions 3

TABLE OF AUTHORITIES

	Page
CASES:	
Appalachian Power Co. v. Train, 620 F.2d 1040 (4th Cir. 1980)	2
E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977)	2, 3
EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980)	3
STATUTES:	
33 U.S.C. § 1311(b)	2
33 U.S.C. § 1314	4
33 U.S.C. § 1317	4
ADMINISTRATIVE ACTIONS:	
48 *Fed. Reg.* 11830 (Mar. 21, 1983)	4
LEGISLATIVE MATERIALS:	
A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 96th Cong., 2d Sess. (1978)	3

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Respondent NRDC has filed a brief in opposition, arguing that the decision below does not create a conflict in the circuits, is not contrary to prior decisions of this Court, and is not sufficiently important to warrant this Court's attention. NRDC's arguments are puzzling and unpersuasive, and provide no valid grounds for denying *certiorari*. Moreover, it is now even more evident that the case involves a continuing question of major importance.

I. The Decision Below Creates A Conflict In the Circuits And Is Contrary To Decisions Of This Court.

According to respondent NRDC, the Third Circuit held that Section 301(l) of the Clean Water Act simply "prohibits variances from *pretreatment* standards for toxic pollutants," and since no other court has ruled on the pretreatment program, there is no conflict in the circuits. (NRDC Br. at 4). This

argument is disingenuous because NRDC has never claimed that § 301(1) is so limited.

In *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980), NRDC argued (as it did below) that "§ 301(1) [of the Act] prohibits EPA from modifying *any* [requirement] of § 301 . . . including BPT limitations for toxic pollutants." (620 F.2d at 1042) (emphasis added). The Fourth Circuit flatly rejected NRDC's argument. (620 F.2d at 1047-48).

A few years later, undaunted by its loss in the Fourth Circuit, NRDC made the same argument in connection with EPA's pretreatment regulations. This time NRDC succeeded. The court below stated that "we must disagree" with the prior decision in *Appalachian Power*. (CMA Pet. Appx. A-43). The Third Circuit ruled that "Section 301(1) forbids modifications" and thus that "FDF variances for toxic pollutant discharges are forbidden by the Act." (*Id.*).

The conflict among the circuits could not be clearer. The fact that the Third and Fourth Circuits had different sets of regulations before them to review is not relevant to the conflict presented.[1] Indeed, it simply illustrates the recurring nature of the controversy.

NRDC also attempts to minimize the importance of this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). NRDC refuses to acknowledge the obvious tension between the decision below and this Court's ruling in *du Pont* that EPA may establish BPT effluent limitations by national regulation "so long as some allowance is made for variations in individual plants, as EPA has done by including a [FDF] variance clause" in its regulations. (*Id.* at 128).[2]

[1] Section 301(1) of the Act does not on its face address pretreatment standards; instead it applies to "any requirement of this section." Putting aside the issue of whether § 301(1) applies to FDF variances, it is quite clear that "the requirements of this section" include BPT and BAT as well as pretreatment regulations. 33 U.S.C. § 1311(b). (*See* NRDC Br. at 2).

[2] BPT and BAT effluent limits and pretreatment standards are established by EPA using a similar methodology, including the availability of FDF variances. (*See* EPA Pet. at 3-5). NRDC notes that in *du Pont* this Court struck down variances for new source standards, and argues that pretreatment standards should be treated the same way. (NRDC Br. at 6). NRDC's point fails to recognize that pretreatment standards, like BPT and BAT limitations, apply to existing plants, which can be retrofitted only with great difficulty. In contrast, new plants can be more readily designed to specifications. That is why Congress treated new sources separately.

NRDC also argues that Congress intended to impose "maximum feasible control" in pretreatment standards as with new sources, citing the legislative history of the 1977 amendments to the Act. (NRDC Br. n.12). However, the legislative history which NRDC cites in fact states that pretreatment standards should generally be at BAT (not new source) levels, taking into account differences between direct and indirect dischargers. (*A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 96th Cong., 2d Sess. 691 (1978)). The pretreatment standards involved in the case below were actually BPT-level standards. (*See* CMA Pet. Appx. at A-76).

NRDC argues that this Court in *du Pont* upheld certain BAT limits not containing an FDF variance clause (NRDC Br. at 6), but fails to note that BAT variances were not an issue in *du Pont*. Moreover, this Court in *du Pont* ruled that "nothing . . . in the Act . . . suggests any radical difference in the mechanism used to impose limitations for the 1977 [BPT] and 1983 [BAT] deadlines" (430 U.S. at 127), which suggests that FDF variances would be just as appropriate for BAT as for BPT.

The fundamental legal question presented is whether an FDF variance is a statutory modification prohibited by § 301(1) of the Act. In *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 77-78 (1980), this Court ruled that an FDF variance was not an "exemption" from the Act's technology-based requirements, but a mechanism for addressing effluent limitations which are "incomplete" and thus defective. (*See* CMA Pet. at 17-18). NRDC's brief does not dispute this important aspect of the Court's decision.

II. The Decision Below Involves Important And Recurring Questions.

CMA's petition showed that the decision below has upset a central feature of the technology-based guidelines and standards program. The implications of the decision below are sharpened by the petition filed subsequently by the United States

Environmental Protection Agency (No. 83-1373) and the brief *amicus curiae* filed by the Chamber of Commerce of the United States.

EPA's brief points out that the Agency has promulgated BAT-level pretreatment and direct discharge requirments for 26 industries within just the last two years, and is in the process of completing its regulations for the remaining industry categories. All of these regulations were developed based on typical plants, relying on the FDF variance clause to address atypical plants. If the decision below stands, the promulgation of EPA regulations would be subject to delay and possible legal challenge. (EPA Pet. at 11).

NRDC attempts to minimize the number of plants that will be affected by the Third Circuit's decision. (NRDC Br. at 7-8). NRDC overlooks three critical facts. First, some plants already subject to regulations may be expected to apply for variances in the future.[3] Second, CMA represents an industry that, for the most part, is not yet subject to nationally-applicable pretreatment, BPT or BAT standards promulgated by EPA. Plants in this industry have been subject to case-by-case limitations because EPA has not yet promulgated final regulations for the Organic Chemicals and Plastics and Synthetic Fibers industry, which by EPA's own estimates will cover between 1200 and 2100 facilities, including almost 500 plants that will be covered by pretreatment regulations.[4] Third, both sections 304 and 307 of the Clean Water Act, 33 U.S.C. §§ 1314 and 1317, require EPA periodically to review, and if appropriate to revise, BPT, BAT and pretreatment regulations. Thus, the conflicting decisions of the Third and Fourth Circuits will continue to have an impact in the future.

[3] Plants often do not become aware of the need for a variance until they have installed the necessary treatment system and it fails to achieve the expected discharge limits. This would ordinarily not occur until three years after promulgation of applicable EPA regulations. Thus, additional plants already subject to regulations may be expected to apply for variances in the future. While EPA's regulations may require variance applications to be filed sooner, EPA has not yet ruled on whether it will accept late applications, and no court has sustained that time-deadline requirement.

[4] 48 *Fed. Reg.* 11830 (Mar. 21, 1983). NRDC is incorrect when it asserts that BPT limits were an interim measure which, by the time of the Fourth Circuit's decision in *Appalachian Power* and Congressional consideration of 1977 amendments to the Clean Water Act, presented a problem that "will not recur." (NRDC Br. at 4). In fact, since the BPT limits for the organic chemicals industry have not yet been promulgated, plants in the organic chemicals industry will be able to obtain variances from BPT limits, but not from pretreatment standards, if the decision of the Third Circuit is allowed to stand.

The U.S. Chamber's brief underscores the significance of the issues presented to all American companies regulated by the Clean Water Act. At least 60,000 firms are potentially subject to national pretreatment standards, and an equal number of firms are potentially subject to BPT/BAT effluent guidelines. (*See* EPA Pet. at 11). It is therefore obvious that the decision below is of considerable importance.

CMA will not respond in detail to NRDC's arguments on the merits. As noted above, this Court in the *National Crushed Stone Ass'n* case has previously recognized the distinction between statutory modifications and FDF variances. The EPA petition and the U.S. Chamber brief also underscore the reasons why the Agency's construction of the Act should have been accepted.

Respectfully submitted,

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